

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY 1995 SESSION

FILED

September 20, 1995

C.C.A. #02C01-9501-CR-00016

Cecil Crowson, Jr.

Appellate Court Clerk

EDDIE WILLIAMS, JR.,

*

C.C.A. #02C01-9501-CR-00016

APPELLANT,

*

SHELBY COUNTY

VS.

*

Hon. John P. Colton, Jr., Judge

STATE OF TENNESSEE,

*

(Post-Conviction)

APPELLEE.

*

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For the Appellee:

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Eddie Williams, Jr., appeals as of right from the Shelby County Criminal Court's judgment denying his petition for post-conviction relief. After a review of the record, and consideration of the issues raised, we affirm the judgment of the trial court.

The appellant was convicted of two counts of robbery with a deadly weapon in 1988, and was sentenced to serve two concurrent life sentences in the Department of Correction. His conviction and sentence were affirmed on direct appeal. State v. Eddie Williams, Jr., No. 20 (Tenn. Crim. App., Jackson, Dec. 28, 1988). The Tennessee Supreme Court denied permission to appeal on April 3, 1989.

On March 16, 1990, the appellant filed his first petition for post-conviction relief, and a second petition was filed on May 30, 1990. The petitions alleged that the appellant had been denied the effective assistance of counsel at trial, that the appellant's prior convictions had been improperly used against him, and that the prosecutor engaged in misconduct at trial. The petitions were consolidated and a hearing was held on December 19, 1991; the trial court denied the petitions on January 10, 1992. The appellant appealed the judgment with respect to the trial court's ruling that he failed to prove the ineffective assistance of counsel claim. This court affirmed. Eddie Williams, Jr. v. State, No. 02C01-9202-CR-00041 (Tenn. Crim. App., Jackson, June 16, 1993). Application for permission to appeal to the Tennessee Supreme Court was denied on November 8, 1993.

On August 10, 1992, (while the appeal from the first post-conviction case was pending in this court), the appellant filed the present suit for post-conviction relief. The petition asserted that the appellant had been denied the effective assistance of

post-conviction counsel under the United States and Tennessee Constitutions. Specifically, the appellant claimed that post-conviction counsel failed to adequately raise an issue regarding prosecutorial misconduct, failed to adequately raise an issue regarding a due process violation, failed to challenge his prior convictions, and failed to give the appellant the opportunity to address the court. An amended petition, which was filed after the appointment of counsel, included the underlying allegations regarding prosecutorial misconduct at trial, and the "misuse" of the appellant's prior convictions to enhance his sentence.¹

The state filed a motion to dismiss the petition on the ground that the issues raised had been either waived or previously determined, and that the appellant did not raise a constitutional issue for relief.² The appellant, in turn, filed a response reiterating his complaints regarding post-conviction counsel, and arguing that the Post-Conviction Act implicitly created a right to the effective assistance of counsel. On August 15, 1994, the trial court dismissed the petition; the court found that the denial of post-conviction counsel was not a constitutional issue cognizable in post-conviction cases, and that all other issues had been waived or previously determined.

The United States Supreme Court has held that there is no constitutional right to counsel in state post-conviction proceedings; thus, no claim may be predicated on the denial of effective assistance of counsel. Coleman v. Thompson, 501 U.S. 722 (1991)(citing Pennsylvania v. Finley, 481 U.S. 551, 555 (1987)). Tennessee courts also

¹ The amended petition, as well as the appellant's response to the state's motion to dismiss, concede that these issues were included in the first post-conviction suit.

² On appeal, the state also argues that the petition was barred by the statute of limitations in post-conviction cases; specifically, the conviction became final on April 3, 1989, and the petition was not filed until August 10, 1992, four months after the expiration of the statute. Tenn. Code Ann. §40-30-102 (1990 Repl.). Although the state's position is correct, we note that the defense was not raised in its motion to dismiss. See Smith v. State, 873 S.W.2d 5, 7 (Tenn. Crim. App. 1993).

have held that the constitutional right to counsel does not apply to post-conviction suits, and that a claim of ineffective assistance of post-conviction counsel is not a viable post-conviction issue. See Caruthers v. State, 814 S.W.2d 64, 65 (Tenn. Crim. App. 1991); State v. Oates, 698 S.W.2d 79, 80 (Tenn. Crim. App. 1985); Dowlen v. State, 477 S.W.2d 253, 255 (Tenn. Crim. App. 1971). Thus, a post-conviction suit cannot be predicated upon the errors or omissions of counsel in a prior post-conviction case. See, e.g., State v. Garrard, 693 S.W.2d 921, 922 (Tenn. Crim. App. 1985); State v. Wilson, 667 S.W.2d 113, 114 (Tenn. Crim. App. 1983).

The appellant argues on appeal that the Post-Conviction Act, which provides for the appointment of counsel in cases where a "colorable" claim for relief has been pled, implicitly established a right to the effective assistance of counsel. This claim has likewise been rejected. In Paul Gregory House v. State, No. 03C01-9110-CR-00326 (Tenn. Crim. App., Knoxville, March 28, 1994), perm. to appeal granted, (Tenn., July 25, 1994), this court said that the statutory right to counsel "has not evolved into a constitutional right." Id. at 8. The court further said that "while it may be an anomaly to provide a statutory right to counsel in post-conviction cases absent any attendant standard of performance, ineffective assistance of counsel in the post-conviction setting does not serve as a ground for relief from the conviction...." Id., slip op. at 8-9.

We conclude, therefore, that the trial court correctly ruled that the petition failed to allege a constitutional basis for relief. See Tenn. Code Ann. §40-30-105 (1990 Repl.). Further, the appellant has not shown that the trial court erred in concluding that his remaining issues had been previously determined or waived.

The judgment of the trial court is affirmed.

William M. Barker, Judge

John H. Peay, Judge

David G. Hayes, Judge